No. 78888-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL FOXHOVEN
AND ANTHONY SANDERSON,

Petitioners.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER SANDERSON

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A. ISSUE PRESENTED

In a prosecution for malicious mischief based on graffiti vandalism, was it error to admit evidence of prior acts of graffiti by the defendant to establish identity when, except for the sequence of letters used, the temporal and geographic proximity, medium, font, style, and method of application were all significantly different between the prior and charged acts?

B. STATEMENT OF THE CASE

1. Substantive allegations. On October 26, 2001, the owners of several businesses in downtown Bellingham discovered that, during the night, acid-etched graffiti had been placed on their shop windows. 3RP 354-55, 357, 359-61, 363, 365-67, 370, 376-78, 379-84; 4RP 387, 390-91.[1] Bellingham police officer Don Almer, who was assigned to the investigation as part of his graffiti emphasis detail, observed three "tags"[2] on the windows: HYMN, GRAVE and SERIES. 4RP 399, 433.

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[1] Transcripts of proceedings, which include a CrR 3.5/3.6 hearing, trial and sentencing, are contained in seven consecutively-paginated volumes referenced herein as follows: September 2 and 29, 2003 – 1RP; June 14 and 15, 2004 – 2RP; June 16 and 17, 2004 – 3RP; June 21, 2004 – 4RP; June 22, 2004 – 5RP; June 23, 2004 – 6RP; June 24, 25 and August 19, 2004 – 7RP.

[2] A "tag" is the moniker used by a graffiti artist. 1RP 47; 4RP 409.

After contacting Seattle Police Detective Rod Hardin, Almer investigated Desmond Hansen as a possible suspect regarding the GRAVE tags. 3RP 284, 289; 4RP 434-35. Almer obtained a search warrant for Hansen's residence and during the search discovered multiple graffiti-related items, including numerous tags of GRAVE and HYMN, as well as a "roll call"[3] associating SERIES with HYMN and GRAVE. 4RP 445-46, 453-56, 466-70.

Almer next searched the residence of Ben Amador, whom he suspected might be associated with the tag HYMN. 3RP 294-95, 299, 476-77, 478-79; 5RP 694-96, 716. Almer located numerous instances of the "HYMN" tag but the predominant tag was ANIK. 4RP 479-83; 5RP 700. Following this search, Almer decided Amador was more likely to be ANIK than HYMN and conducted no further investigation of Amador. 5RP 711.

Almer then searched the Bellingham residences of Luke Meighan and Reid Morris. 4RP 486. Inside, he found evidence of the tags REFER, SPIRE and HYMN, as well as photographs of petitioner Anthony Sanderson painting a train with the tag HYMN and the "crew tag" UPSK. 4RP 489, 493, 530-33. Based on this

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[3] In a "roll call", taggers will list the tags of other members of their graffiti "crew," or persons they habitually associate with to do graffiti. 3RP 298; 4RP 447.

evidence, Almer began investigating Sanderson and ultimately obtained a search warrant for Sanderson's residence in Seattle. 1RP 5; 4RP 536, 538.

Pursuant to the warrant, Almer searched the computer in Sanderson's living room. 1RP 11, 31, 36, 66-67. He found folders in the computer's hard drive titled "HYMN", links to internet sites about graffiti, and digital photographs of HYMN tags. 1RP 13, 31-32, 66-67. According to Almer, when he confronted Sanderson with this evidence, Sanderson requested to speak with Almer privately and allegedly gave a lengthy confession which implicated both Desmond Hansen and Sanderson's co-defendant, Lawrence Michael Foxhoven. 1RP 15, 30.[4]

2. Motion to exclude prior acts. Pretrial, Sanderson moved to exclude evidence of Sanderson's prior graffiti-related arrests, the graffiti-like artwork seized from Sanderson's house during the

search warrant's execution, and photographs of Sanderson allegedly painting graffiti "tags." CP 123-25; 135-38. The state claimed in response that the evidence was admissible to prove a common scheme or plan to place graffiti in many prominent locations to gain notoriety and in the alternative to prove *modus operandi*. 2RP 195-201. The defense responded that the evidence did not rise to the stringent level of similarity of a signature crime. 2RP 196. Despite finding Almer was not qualified to testify that the same person committed the prior and current offenses, the court nonetheless found the evidence admissible to prove both common scheme or plan and *modus operandi*. 2RP 204-07; 4RP 420-25, 430-31, 452.[5]

As a result, at trial, the State presented evidence that: (1) Sanderson was investigated for graffiti vandalism in a train yard on

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[4] Sanderson, his mother and her friend, Delcee Golding, disputed Almer's account, stating Sanderson never requested a private conversation or acknowledged involvement in the Bellingham incidents, and that Almer became progressively more angered as Sanderson continued to deny he was involved. 1RP 67-68; 6RP 870, 874-76, 895-96. Other law enforcement witnesses offered inconsistent testimony regarding whether they heard Sanderson confess and the substance of the confession. See e.g. 1RP 106-07; 3RP 329, 335 (Bellingham police sergeant Flo Simon testified at CrR 3.5 hearing that she was not "in hearing vicinity" during confession; at trial the same witness claimed that although she did not prepare her own report, reading Almer's police report refreshed her recollection that she did hear the confession); 3RP 289-93 (Seattle Police Detective Rod Hardin testified he did not recall Sanderson's confession).

June 17, 2002, based on an incident that involved Desmond Hansen and another young man named Kevin Stalker, 2RP 257-70; (2) numerous HYMN tags were recovered from Hansen's bedroom, as well as "piece books"[6] and "roll calls" associating SERIES, HYMN and GRAVE, 4RP 445-456, 469-71; (3) photographs of Sanderson and Hansen were found on a graffiti website, 4RP 469; (4) HYMN tags were found throughout the Meighan/Morris residence as well as photographs of a HYMN tag on a train and of Sanderson painting HYMN and UPSK on a train, 4RP 488, 493, 504, 509-10, 513, 519; (5) numerous pieces of loose-leaf paper with HYMN TWO and TONY written on them were recovered from Sanderson's room, 5RP 562-69; (6) some 50-60 images of HYMN or UPSK graffiti were found on Sanderson's computer; and (7) SERIES and HYMN tags were found in "piece books" in Foxhoven's residence, 5RP 604-08.

A Whatcom County jury convicted Sanderson and Foxhoven of six counts of malicious mischief in the second degree and one

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[5] At one point during the trial, the court read a limiting instruction to the jury that limited their consideration of prior acts evidence to these purposes. 4RP 452.

[6] A "piece book" is a book in which graffiti taggers practice their tags. Almer testified that a graffiti tagger will give a piece book to a brother graffiti tagger to sign. 4RP 453.

count of malicious mischief in the first degree. CP 61-63. The court dismissed one count and lowered the degree on three others to reflect the charges in the state's original information, and imposed standard range sentences. 7RP 1038; CP 47.

3. Proceedings on Appeal. On appeal, Sanderson challenged, *inter alia*, the admission of Sanderson's prior graffiti-related arrests, the graffiti-like artwork seized from Sanderson's house during the search warrant's execution, and photographs of Sanderson allegedly painting graffiti "tags." Br. App. 17-28. The court of appeals misapplied the test for admissibility under the *modus operandi* exception to ER 404(b), and so found that because police discovered photographs of Sanderson and Foxhoven using "SERIES" and "HYMN" tags, this was probative of their identity as the Bellingham taggers. Slip Op. at 5-7. The court reasoned that because the purpose behind using a tag is to identify the tagger to other graffiti artists, differences in "font, style, medium and the objects on which [the tags] were painted" went to the weight, not the admissibility of the evidence. Slip Op. at 6-7.

This Court has granted Sanderson's petition for review.

C. ARGUMENT

1. BECAUSE IT IS USED TO PROVE IDENTITY, THE *MODUS OPERANDI* EXCEPTION TO ER 404(b) REQUIRES A STRINGENT AND UNIQUE DEGREE OF SIMILARITY BETWEEN THE MEANS EMPLOYED IN THE COMMISSION OF THE PRIOR ACT AND THE CURRENT OFFENSE BEFORE THE PRIOR ACT MAY BE ADMITTED. THE DIFFERENCES IN STYLE, FONT, MEDIUM AND METHOD BETWEEN THE PRIOR ACTS AND THE CHARGED OFFENSE PRECLUDE APPLICATION OF THE *MODUS OPERANDI* EXCEPTION.

a. This Court's analysis of the *modus operandi* exception to ER 404(b) is consistent with the historical foundation of the rule and its prudential justification and should not be diluted.

i. The rule. Prior acts evidence is admissible under ER 404(b)[7] only if it is offered for some purpose other than to prove the defendant's propensity to commit the charged crime and is relevant for that purpose. Therefore, before a trial court may admit evidence of other crimes or misconduct, it must: (1) find by a preponderance of the evidence that the misconduct occurred; (2)

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[7] ER 404(b) provides,

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

determine whether the evidence is relevant to prove an essential ingredient of the crime charged; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); see also State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981) ("the true test of admissibility of unrelated crimes is not only whether they fall into any specific exception, but whether the evidence is relevant and necessary to prove an essential ingredient of the crime.").

ii. Standard of review. This Court reviews the interpretation of an evidentiary rule *de novo* as a question of law. State v. DeVincentis, 150 Wn.2d 11, 20, 74 P.3d 119 (2003) (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). Once the rule is correctly interpreted, the trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. Id.

iii. The narrow bounds of the *modus operandi* exception. The *modus operandi* exception to ER 404(b) is not employed to prove that the crime occurred, but the identity of the

crime's perpetrator. DeVincentis, 150 Wn.2d at 20. For this reason, there must be a stringent degree of similarity between the prior act and the current offense before the prior act may be admitted. Thang, 145 Wn.2d at 643. In Thang, this Court held that when the State seeks to introduce evidence of prior bad acts as proof of identity by establishing a unique *modus operandi*, the evidence will be relevant to the current charge "only if the method employed in the commission of both crimes is 'so unique' that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." Id. This Court subsequently reiterated,"When identity is at issue, the degree of similarity must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature." DeVincentis, 150 Wn.2d at 21. "*Mere similarity* of crimes will not justify the introduction of other criminal acts under the rule. There must be something *distinctive or unusual* in the *means employed* in such crimes *and* the *crime charged.*" State v. Smith, 106 Wn.2d 772, 777, 725 P.2d 951 (1986) (quoting State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 798 (1984) (emphases in original)).

The rigorous predicate for admission required by this Court is consistent with the *modus operandi* rule as it has evolved in United States jurisprudence. In the landmark case of People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (N.Y. 1901), the Court explained the reason for requiring a stringent degree of similarity when evidence of extraneous crimes is used to prove identity:

> In the nature of things there cannot be many cases where evidence of separate and distinct crimes, with no unity or connection of motive, intent or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other. The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but on the superadded evidence of the previous crime.

Molineux, 61 N.E. at 302.

With the codification of evidence rules such as Fed.R.Evid. 404(b) and Washington's ER 404(b), courts have continued to strictly circumscribe the evidence that may be admitted under the *modus operandi* exception. See Thang, 145 Wn.2d at 643-45; Smith, 106 Wn.2d at 777-78 (and cases cited therein); People v. Ewoldt, 7 Cal. 4th 380, 403, 867 P.2d 757 (1994) ("The greatest degree of similarity is required for evidence of uncharged

misconduct to be relevant to prove identity."). In these cases, courts universally have held evidence of a unique *modus operandi* requires a showing that "other crimes by the accused [are] so nearly identical in method as to earmark them the handiwork of the accused." McCormick on Evidence § 190 at 559 (3rd Ed. 1984); United States v. Goodwin, 492 F.2d 1141, 1154 (5th Cir. 1974) (evidence inadmissible to prove *modus operandi* where lacking such "peculiar, unique, or bizarre similarities as to mark them as the handiwork of the same individual"); United States v. Myers, 550 F.2d 1036, 1045 (5th Cir. 1977) (reversing based on admission of prior bank robbery despite superficial similarities between present and prior offense).

One commentator has explained,

> Under [the "identity-through-*modus-operandi*"] theory, both similarity *and uniqueness* are required because the indispensable inference here – the one that replaces the propensity evidence – is this: "The charged and uncharged crimes are so similar and unique it is reasonable to conclude the same person (and no one else) committed both."

Richard J. Sanders, "A Dangerous Bend in an Ancient Road": The Use of Similar Fact Evidence for Corroboration, 74 Fla. Bar J. 40, 44 (Feb. 2000) (emphasis in original).

b. A proper application of the *modus operandi* exception fails to evince the requisite similarity of means employed; the evidence should have been excluded and Sanderson's convictions must be reversed. Had Division One correctly applied the *modus operandi* rule, the evidence would have been excluded. As the court acknowledged, the "tags in question do vary in their font, style, medium and the objects on which they were painted." Slip Op. at 7. Thus, there was no distinctive and unusual aspect of the means employed in the commission of the prior acts that was also present in the current offense. That both the prior acts and current offense involved "HYMN" tags is of no moment; the trial court had ruled Almer was not qualified to render an opinion that the various HYMN tags offered at trial were done by the same person. 4RP 420-25. Finally, extensive testimony contradicted the claim that only one graffiti tagger would have exclusive use of a particular tag. See e.g. 3RP 286-87 (Detective Hardin testified that although it is frowned-upon for a tagger to "bite", or copy another tagger's style, taggers will frequently "hook up" a friend's tag – i.e., put it up – to give the friend "props"); 3RP 398 (Detective Hardin described the practice of a "roll call", in which a tagger will list the other members of his graffiti "crew"); 4RP 476, 479-80; 6RP 774

(Almer testified that Ben Amador apparently practiced the tag "HYMN"); 5RP 689-90 (Almer acknowledged that Sanderson was previously affiliated with the tags SUPS and UPROCK); 6RP 823-25 (Almer admitted that while taggers are developing their styles it is okay to "bite" others' styles, and that a "toy", or beginning tagger, may copy others' tags without fear of recrimination). The commonality of names, therefore, does not create a reliable inference that Sanderson acid-etched the "HYMN" tags at issue in the current offense.

Division One rationalized its admission of the evidence because "a tag is like a signature." Slip Op. at 6. However, the assertion that a tag is "like a signature" equates to a "signature-like similarity" between tags is a logical fallacy.

In its colloquial sense, a "signature" is defined as "the name of a person written with his own hand to signify that the writing which precedes accords with his wishes or intentions" or simply "the act of signing one's name." Webster's Third New International Dictionary 2116 (1993). A "tag," as the moniker of a graffiti artist, may crudely be viewed as that artist's "signature" without communicating anything about the similarity between various uses of that "tag" by the artist, his friends, or his imitators. By contrast,

the descriptive term "signature-like similarity" is a legal term of art that signifies the unusual degree of distinctiveness in the *means employed* which is needed for a prior act to be admissible to prove *modus operandi*. See Thang, 145 Wn.2d at 643; State v. Coe, 101 Wn.2d 722, 777-78, 684 P.2d 668 (1984) (i.e., "The device must be so unusual and distinctive as to be like a signature.") (quoting E. Cleary, McCormick on Evidence § 190, at 449 (2nd Ed. 1972)).

The "tags" here may have been admissible had the State called an expert—for example, a handwriting expert—to testify to unique features present in the prior acts and present offense that created a high probability that the accused committed the act charged. The State did not do so. In the absence of other similarities, such as of font, style, and medium, between the prior acts and the crime charged, therefore, there simply were no distinctive or unusual common features to warrant admission.

The court of appeals commented, "these apparent differences go to the weight, rather than the admissibility of this evidence." Slip Op. at 7. This fundamentally mistakes the question. The differences are precisely what *prevent* the prior acts from being sufficiently "identical in method" to create the requisite "high probability" that the same person also committed the charged

offense. Thang, 145 Wn.2d at 643. Moreover, once the evidence has been admitted, the damage ER 404(b) seeks to prevent has been done. Here, for example, the other acts evidence made a conviction virtually certain, particularly given the sheer volume of documents and images the State was permitted to introduce at trial. This Court should hold the admission of Sanderson's prior uses of the "HYMN" tag was improper to prove his identity as the crime's perpetrator, and reverse Sanderson's conviction.

2. BECAUSE THE EXISTENCE OF THE CRIME WAS NOT IN DISPUTE AND THE EVIDENCE WAS NOT OFFERED TO PROVE AN OVERARCHING CRIMINAL ENTERPRISE, THE COMMON SCHEME OR PLAN EXCEPTION DID NOT APPLY.[8]

This Court has identified two circumstances where the defendant's commission of crimes similar to the crime charged may be admissible under the "common scheme or plan" exception to ER 404(b). The first is where several crimes "constitute constituent parts of a plan in which each crime is but a piece of the larger plan." State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995).

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[8] Below, the State asserted admission of the evidence under the "common scheme or plan" exception was not an abuse of discretion but provided no authority for this contention. Br. Resp. at 19-20. The Court of Appeals did not address the "common scheme or plan" exception in its analysis of the ER 404(b) issue.

Under this exception, the State must show the prior acts are causally related to the crime charged, as in an ongoing criminal enterprise. DeVincentis, 150 Wn.2d at 19 (citing Lough, 125 Wn.2d at 860). An example of this type of common scheme or plan would be the theft of a tool or weapon used to commit a subsequent crime, such as a burglary. DeVincentis, 150 Wn.2d at 19. This type of common scheme or plan is plainly not at issue here, as there was no claim of an ongoing criminal enterprise of which the prior acts were a part, and no causal relationship was shown between the prior acts and the charged crime.

The second circumstance where evidence may be admitted to show a common plan arises only where the *existence of the charged offense itself is in dispute*. DeVincentis, 150 Wn.2d at 19-21; Lough, 125 Wn.2d at 853 (citing John H. Wigmore, Evidence § 304 at 249 (James H. Chadbourn rev. ed. 1979)). In this circumstance, the State may introduce evidence tending to show an individual has devised a plan and used it repeatedly to perpetrate separate but very similar crimes. DeVincentis, 150 Wn.2d at 21 ("the issue in the present case was not the identity of the perpretrator, but whether the crime occurred"); Lough, 125 Wn.2d at 855 (prior acts of drugging then raping victims admissible

to prove the same plan was used in the present case and to rebut defendant's claim of consent); see also State v. Wermerskirchen, 497 N.W.2d 235, 240 (Minn. 1993) (other crimes admissible under common plan exception to prove *doing* of charged act).

Here, there was no contention that the prior acts were offered to prove the existence of the charged offense; thus, this theory of admissibility under the "common scheme or plan" exception does not apply either.

In sum, the trial court's application of the common scheme or plan exception was patently improper. The State's theory of admissibility – that Sanderson's "plan" was to gain notoriety by placing his graffiti name in a variety of locales – was a barely disguised effort to argue propensity, which is forbidden by ER 404(b). This Court should reject any claim that the "common scheme or plan" exception justified admission of the prior acts.

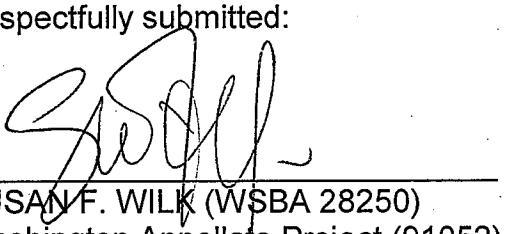
D. CONCLUSION

Petitioner Anthony Sanderson respectfully asks this Court to hold that substantial differences between the method employed in the commission of prior acts precluded their admission to prove his identity as the perpetrator of the current offenses under the *modus operandi* exception to ER 404(b). He also asks this Court to reject

any claim that the "common scheme or plan" exception provided an alternative justification for admission of the evidence. Because this Court cannot be confident the jurors would have reached the same verdict had the propensity evidence been excluded, this Court should reverse Sanderson's convictions and remand for a new trial.

DATED this 10th day of May, 2007.

Respectfully submitted:



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DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 10TH DAY OF MAY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER SANDERSON** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF MAY, 2007.

X_____